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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No. 231

ANNA DESPER, Administratrix of the Estate of Thomas J. Desper, Deceased,

Petitioner,

VS.

STARVED ROCK FERRY COMPANY, a corporation,

Respondent.

PETITION FOR REHEARING.

JOSEPH D. RYAN,
Attorney for Petitioner.

CHAMPLIN-SHEALY COMPANY, CHICAGO 388

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Petitioner respectfully asks that a rehearing be granted in this case. The Court's decision represents a departure from its policy of liberal interpretation of the Jones Act, continuously adhered to since *International Stevedoring Company* v. *Haverty*, 272 U. S. 50. We cannot help feeling that the heavy burden of work imposed upon this Court has prevented a majority of the Justices from giving adequate consideration to this case.

Respondent corporation's sole business and function was to run sightseeing boats, carrying from 55 to 150 passengers, on the Illinois River. Decedent's principal task of operating these boats, as a licensed navigator, was the

very essence of a seaman's work, and everything he did in preparation for it was an essential part of it and of respondent's business. What real difference did it make that he had not yet entered upon the performance of his primary duties? Only those employees who have nothing more than a mere expectation of being hired as crew members when the season begins (*Taylor* v. *McManigal*, 89 Fed. 2d 583, 6th Cir.) can correctly be called expectant seamen. Such designation cannot be given those definitely hired for the season.

In *South Chicago Coal Co.* v. *Bassett*, 309 U. S. 251, 259, 260, this Court held that the employee's primary duties determined whether he was a member of a crew, and if such duties were in aid of navigation, he was a crew member. It was also recognized that the question was essentially one of fact. The primary duties test was adhered to in *Norton* v. *Warner Co.*, 321 U. S. 565. Other courts, including the Court of Appeals for the Second Circuit (*Merritt-Chapman and Scott Corp.* v. *Willard*, 189 F. 2d 791, 792) believe that this Court has made primary duties the test. In the instant decision, this Court has departed from the primary duties test. A number of cases in which the primary duties criterion is applied appear at page 15 of petitioner's reply brief. So tested, decedent's employment clearly appears to be that of a seaman. At the very least, the work decedent was doing at the time of his death cannot be viewed in isolation, without regard to its relation to his primary duties. Since this work was absolutely necessary to the performance of the latter, a jury could reasonably find that decedent was a seaman.

It is said that the work decedent was doing at the time of his death quite clearly was not that usually done by a seaman. This may be true of seamen employed at other times and places, but it was not true of respondent's operators,

who customarily engaged in the fitting out work (Petition page 6). It is stated, also, that in the case of larger vessels, work of this kind is customarily done by exclusively shore-based personnel. But in the case of Great Lakes steamers, it appears to be customary for seamen, whether living on the boats or not, to fit them out. "It is the custom on the Great Lakes for the seamen who sail the ships to fit them out and lay them up. . . ." *Weaver* v. *Pittsburgh Steamship Co.*, 153 F. 2d 597 (6th Cir.) at 599. See also, *Taylor* v. *McManigal*, 89 F. 2d 583 (6th Cir.). And it is not unusual for members of crews of ocean going vessels, laid up in drydock for long periods of repairs, to help in such work. *Hunt* v. *United States*, 17 F. S. 578 (S. D. N. Y.); *United States* v. *Lindgren*, 28 F. 2d 725 (4th Cir.). Especially in view of the fact that this Court has always held (petition page 14) that the repair of a ship, whether afloat, in drydock, or on land, is maritime work, it cannot be said that it is unusual for a seaman to engage in it, particularly where the testimony is to the contrary.

The boats may not have been afloat, as the Court remarks, but they were on a marine track, which is the equivalent of a dry dock (*Cont. Cas. Co.* v. *Lawson*, 64 F. 2d 802, 5th Cir.; *Maryland Cas. Co.* v. *Lawson*, 101 F. 2d 732, 5th Cir.) on which they could be run into the water in five or six minutes. The remote contingency that they might not be launched (they were in fact in operation a week or so after decedent's death—petition page 7) or that decedent might not operate one, should certainly not deprive him of the status of seaman "in being" while he was engaged in work so closely related to their navigation. There is always a possibility that engines, trains and cars definitely assigned for use in interstate commerce may, for one reason or another, not be so used, but that possibility has never been held to nullify the interstate character of

the work of preparing them for such use. Neither should the analogous possibility in the instant case preclude the decedent's being a seaman at the time of his death. This Court could well have held as a matter of law that decedent was a seaman. At the very least, it was a question for the jury.

We respectfully submit that the Court's statement that the boats had neither captain nor crew is misleading. Decedent and respondent's manager, who were both operators, were available to act as the one-man captain and crew of any of respondent's boats, had any then been ready for operation. Decedent and the manager, together with a third man to be hired, constituted the crew of respondent's four vessels. They were a kind of floating crew, licensed and ready at any time to operate any of the boats, of which the particular operator would then be the captain and crew. Since decedent and the manager were available for this purpose, it cannot be said that the boats had no captain or crew. Such a statement could only be made with regard to a larger vessel having a complement of a captain and a number of seamen, who had not yet been hired.

It is stated that the distinct nature of decedent's employment is emphasized by the fact that the boats, having been laid up for the winter, were not engaged in navigation at the time of his death. But *Hawn* v. *American S.S. Co.*, 107 F. 2d 999, 1000 (2d Cir.), and *Seneca Washed Gravel Corp.* v. *McManigal*, 65 F. 2d 779, 780 (2nd Cir.), cited by the Court, lend no support to its ultimate finding that decedent was not a seaman.

In the *Hawn* case the ship had been out of commission more than a year at the time of the plaintiff's injury, and she was about to be used for storage purposes, there being no present intention to return her to navigation. Plaintiff was one of a number of men hired by the day to move the ship by hand along a wharf so that the grain chutes by

means of which she was to be loaded with grain for storage could reach her hatches. Plaintiff's work was properly held to be like that of a longshoreman. In the *Seneca* case the court did remark that the ship was not in navigation, but placed its decision on the ground that, considering plaintiff's year-round duties (he was a night watchman) it appeared that he was never on the ship when she was under way, and performed no duties in aid of navigation at any time.

As we have heretofore pointed out, the Court of Appeals for the Second Circuit now regards primary duties as the test which determines the employee's status. (*Merritt-Chapman and Scott Corp.* v. *Willard,* 189 F. 2d 791, 792.) That court long before, in *Wheeler Shipyard* v. *Lowe,* 13 F. S. 863, 82 F. 2d 1022, had held that the essential nature of the employment, and not the work being done at the moment, was determinative of status. If this test is correct, then the question whether the ship is technically in or out of navigation becomes immaterial.

Antus v. *Interocean S.S. Co.*, 108 F. 2d 185, 187 (6th Cir.) is also cited by this Court. There the plaintiff, who had been a member of the crew, had been paid off at the end of the season but remained on board for the purpose of laying up the vessel. He was paid on a different basis for this work. He was injured while cleaning the bilges. Although denying him a recovery under the Jones Act, the court clearly implied that if he had been preparing the vessel for navigation he would have been a seaman within the provisions of the statute.

Properly regarded, the question whether a ship was at the time of an accident engaged in navigation is significant only insofar as it may throw light on the question whether the employee had in fact been hired as a member of a crew, or whether he merely had an expectation that he might be

so hired later when the crew should be selected. Where, as here, there was no time in the future at which a crew would be hired and organized, but the method was merely to rehire the preceding year's operators during the fitting out period, and there was no doubt that decedent had been rehired for the season, the question of navigation or no navigation is without significance.

Particularly appropriate is the language of the court in *United States* v. *Lindgren*, 28 F. 2d 725, 728 (4th Cir.):

> "Certainly seamen employed to take a ship to sea who are engaged in making her ready for the voyage are not to be denied the status of seamen and the benefit of the [Jones] Act merely because the vessel is not commissioned at the time."

Also in point is the following statement in *Jones* v. *Shepherd*, 20 F. S. 345 (S. D. Miss.):

> "The evidence is without dispute that prior to the time the boat laid up he was a member of the crew, and while it was not specifically mentioned that he would be a member of the crew when he returned to load the coal on the boat preparatory to its further use in the same kind of business, yet it is a reasonable inference that he immediately became a member of the crew in the same capacity and at the same rate of pay and in the performance of the same kind of duties he had theretofore been performing."

The Court has also held that the 1939 amendment of the F.E.L.A. may not be invoked to determine whether decedent was a seaman within the meaning of the Jones Act, because the amendment has no effect on the "right or remedy" of railway employees, but merely redefines "employee" so as to enlarge its scope. But if such redefinition extends the benefits of the Act to more employees, then it clearly extends its right and remedy to the additional group within its purview. A large group of railway employees were brought under the F.E.L.A. who had theretofore been

excluded. The 1939 amendment, which gave them its benefits, had a very definite effect on their rights and remedies. This being so, the Jones Act expressly requires its application in Jones Act suits.

The principle established by the 1939 amendment is that if any part of his duties brings the employee within the Act he is under it at all times. This is certainly a principle of recovery established for railroad employees, which Congress must be taken to have made applicable in Jones Act suits so far as the words and the Constitution permit. *O'Donnell* v. *Great Lakes Co.*, 318 U. S. 36, 39. Applied in the admiralty setting, it must extend the benefits of the Jones Act to all employees any part of whose duties are those of a seaman. If it be said to redefine the scope of railway employee, it must correspondingly redefine the scope of seaman.

Even if decedent were not under the Jones Act, the Longshoremen's and Harbor Workers' Compensation Act is not applicable, since it provides (33 U. S. C. A. Sec. 903) that "No compensation shall be payable in respect of the disability or death of . . . a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net. . . ." Respondent's boats were all under eighteen tons net (R. 103). Decedent was killed while he was fitting out or repairing them, and he had been engaged by respondent to make these "seasonal repairs", as an incident to his main employment. As none of the vessels had a "master", strictly speaking, we take it that respondent would come within this designation for the purposes of the Longshoremen's Act. That Act is clearly inapplicable in this case.

We respectfully suggest that great weight should have been given to the jury's finding in this case. *Gahagan Const.*

Co. v. *Armao,* 165 F. 2d 301, 305, 307 (1st Cir.). Surely it cannot be said that there was no evidence from which a reasonable man could conclude that decedent was a seaman. They had a right to consider the main purpose for which he was hired, and the relation of the work he was doing to that purpose. They could consider that it was customary for operators to fit out the boats, that the rate of pay was the same, and that decedent was a licensed navigator. Under these circumstances, they were clearly justified in finding that he was a seaman.

Respectfully submitted,

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JOSEPH D. RYAN,
Attorney for Petitioner.

Certificate of Counsel.

I, Joseph D. Ryan, counsel for Anna Desper, petitioner herein, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

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